

3 OCTOBER 1994



Law

**COOPERATION WITH THE OFFICE OF THE
SPECIAL COUNSEL**

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Pages: 11

Distribution: F

This instruction implements Secretary of the Air Force Order 111.1, *Functions and Duties of the General Counsel*. It assigns responsibilities and establishes procedures for cooperating with the Office of the Special Counsel (OSC). It provides internal guidance to all Air Force civilian and military members; it does not establish an independent basis for any person or organization to assert a right, benefit, or privilege.

The OSC's statutory authority includes authority to investigate and prosecute persons who commit prohibited personnel practices or *Hatch Act* violations or who retaliate against whistleblowers. The OSC also has authority to require the Air Force to investigate certain types of alleged improprieties.

This instruction applies to all Air Force members and employees, including those of the Air National Guard and Air Force Reserves. Use it with Department of Defense (DoD) Directive 5500.19, *Cooperation with Office of Special Counsel of the Merit Systems Protection Board*, December 6, 1985.

1. Responsibilities:

1.1. Office of the Secretary of the Air Force (SAF). The SAF oversees all Air Force-OSC matters. This instruction delegates the SAF's OSC responsibilities, except in circumstances where delegation is prohibited by law.

1.1.1. SAF/GC. The SAF designates the General Counsel (GC) as the Senior Management Official (SMO) who provides overall guidance on OSC matters. The SAF/GC:

- Arranges for an investigation of OSC allegations that have been referred to the SAF and tells investigating organizations what the reporting requirements are.
- Forwards to the Inspector General, Department of Defense (DoD/IG) copies of each allegation of improper or illegal conduct that OSC refers to SAF.
- Reviews and coordinates on recommended corrective actions resulting from the record of fact-finding.

- Reviews Air Force reports to the OSC for adequacy and legal sufficiency.
- Designates a liaison officer for all OSC investigations conducted at Air Force Headquarters (HQ USAF).
- During OSC investigations, assigns legal counsel, if appropriate, to represent an Air Force employee or military member whom the OSC suspects of committing an improper act. (See paragraph 4.)

1.1.2. SAF/IG:

- At the request of the SAF/GC, investigates allegations of improper or illegal conduct referred to the Air Force.
- Submits a written report with recommendations to SAF/GC. The reports must meet SAF/GC time constraints and follow a format that is releasable to OSC under Title 5, United States Code (U.S.C.), Chapter 1213.

1.2. Air Staff, United States Air Force:

1.2.1. HQ USAF/DP . The Deputy Chief of Staff, Personnel (DP) provides military and civilian personnel policy guidance on OSC issues and may recommend corrective personnel actions to the SAF/GC.

1.2.2. TJAG . The Office of The Judge Advocate General (TJAG) provides general guidance through supervisory Judge Advocate channels to the Central Labor Law Office (CLLO), Staff Judge Advocates (SJA), and liaison officers in connection with all OSC investigations.

1.2.3. The CLLO Chief:

1.2.3.1. Tells SAF/GC of any OSC investigation and consults with SAF/GC on any legal or policy issue arising from an OSC investigation.

1.2.3.2. Serves as the Air Force point of contact in providing assistance to OSC investigators.

1.2.3.3. Where, following an investigation, the OSC brings an action on behalf of an employee, acts as attorney of record before the Merit Systems Protection Board (MSPB) in administrative matters that arise from an OSC investigation. Files the necessary pleadings and appears before the MSPB to represent Air Force concerns and interests.

1.2.3.4. Monitors ongoing OSC investigations within Air Force.

1.2.3.5. Informs appropriate Air Force personnel of the nature and basis for an OSC investigation, as well as the rights and duties of Air Force personnel in OSC investigations.

1.2.3.6. Reviews and prepares recommendations to SAF/GC when OSC recommends corrective action, addressing:

- Whether the Air Force should take disciplinary action against civilian employees or military members.
- Whether the information warrants referral to appropriate authorities for corrective and disciplinary action.

1.2.3.7. Seeks OSC approval for proposed disciplinary action against a civilian employee for an alleged prohibited personnel practice or other misconduct that the OSC investigated or is investigating.

1.2.3.8. Reviews and prepares recommendations on requests for agency provided counsel, including identifying available attorneys to act as individual representatives. Upon approval of SAF/GC, after consultation with appropriate commander or supervisor, details civilian and military attorneys to represent individual military members or employees.

1.2.3.9. Informs OSC when an investigation duplicates the efforts of a proposed or incomplete OSC investigation.

1.2.3.10. Helps base- and command-level SJA offices to fulfill their duties as liaison officers under this Instruction.

1.2.4. Liaison Officers:

1.2.4.1. The SJA designates an attorney to act as liaison officer for OSC investigations. This attorney is the official point of contact for the OSC investigator. The liaison officer:

- Immediately informs the CLLO of any OSC inquiry or investigation.
- Acts as the legal representative of the command, activity, or installation.
- Assists the OSC investigator with administrative matters.
- Processes all OSC requests for documents.
- Arranges for OSC to interview civilian employees and military members.
- Informs personnel of the nature and basis of the OSC investigation, the authority of the OSC, and the rights and duties of Air Force personnel, including those set forth in paragraph 3.
- Consults with the CLLO chief on policy and legal issues arising from the OSC investigation and keeps him or her up to date on the investigation.

1.2.5. Activity Commanders, Management Officials, and Employees . These personnel must cooperate with and participate in OSC inquiries.

1.2.5.1. Commanders take action to ensure that managers refer all initial OSC contacts within the activity to the SJA.

1.2.5.2. Employees must participate in OSC investigations if requested (see paragraph 3).

2. Procedures:

2.1. Allegations Referred to the Secretary of the Air Force for Investigation:

2.1.1. When OSC refers allegations of improper or illegal conduct to SAF, SAF/GC issues a request for investigation to SAF/IG.

2.1.1.1. Requests must include all reporting requirements. Send a copy of any request to the Inspector General, DoD (DoD/IG).

2.1.2. SAF/IG officials must conduct an inquiry into the allegations and submit a report with recommendations to SAF/GC within the time frame requested.

2.1.3. SAF/GC sends the report to the SAF for signature and issues the report promptly to OSC.

2.2. Investigations Conducted by the OSC:

2.2.1. The OSC may contact the Air Force at the activity, command, or headquarters level.

2.2.1.1. Commanders instruct management personnel to refer all initial OSC contacts to the SJA.

2.2.1.2. The SJA or designated liaison officer is the official point of initial contact for the OSC representatives.

2.2.2. Tell employees who will be questioned in an OSC investigation of their rights, as outlined in paragraph 3.

2.2.3. Process requests for agency-provided counsel according to paragraph 4.

2.2.4. Management officials must neither influence witnesses' testimony nor create the appearance of doing so.

2.3. OSC Requests for Documents . The liaison officer helps the OSC to identify the custodian of any requested documents.

2.3.1. The Air Force may release records and documents to OSC representatives if:

- The release request is in writing.
- The release is not prohibited by law, Executive Order, Government rule or regulation, or Air Force instruction.
- The information is not otherwise privileged.

2.3.1.1. If the release is prohibited solely by Air Force instruction, the office of primary responsibility for that instruction recommends whether to release the documents to SAF/GC; SAF/GC makes the final decision regarding release.

2.3.1.2. Do not release records and documents that constitute attorney work product without approval from SAF/GC.

2.3.2. Process OSC requests involving classified information under DoD Directive 5200.1, *DoD Information Security Program*, June 7, 1982, With Changes 1 and 2, and AFI 31-401, *Information Security Program Management* (formerly AFR 205-1).

2.3.3. If the OSC files a complaint with the MSPB against the Air Force or an Air Force employee after its investigation is complete, release records and other information according to MSPB's rules of discovery at 5 Code of Federal Regulation (CFR), part 1201.

2.4. Corrective Action or Discipline. Management officials are responsible for taking corrective action and, if supported by the evidence, initiate disciplinary action against offending officials for improper or illegal conduct.

2.4.1. When the SAF approves any final Air Force report to the OSC, SAF/GC refers military members and civilian employees determined to have committed improper or illegal acts to responsible officials for appropriate disciplinary action.

2.4.1.1. Do not take disciplinary actions against civilian employees until SAF/GC has obtained approval from the OSC.

2.4.1.2. Management may start other corrective actions, including discipline of military members and improvement of procedures, without OSC approval.

2.4.2. AFI 36-704, *Discipline and Adverse Action* (formerly AFR 40-750), or AFRD 36-9, *Air Force Senior Executive Service*, gives guidance on disciplining civilian employees.

2.4.3. For military members, the OSC has statutory authority only for recommending disciplinary or other appropriate actions to the SAF.

2.4.3.1. If such actions are warranted, the CLLO may recommend to SAF/GC, through AFLSA/JACL, AFLSA/JAC and TJAG that appropriate cases be referred for command action following final disposition by SAF/GC and SAF.

2.4.3.2. The SAF must report back to the OSC within 60 calendar days on each OSC recommendation and the action taken.

2.4.4. For contractors, the OSC has statutory authority only for recommending disciplinary or other appropriate actions against contractors to the SAF.

2.4.4.1. The SAF/GC helps identify accountable management officials; the SAF reports back to the OSC within 60 calendar days on each recommendation and the action taken.

2.5. Funding for OSC Activity . Unless the involved Air Force organizations agree to other arrangements, the activity under investigation pays for all expenses.

2.5.1. These expenses may include funding for witnesses, legal counsel for assistance at interviews, and legal counsel for representation as approved by the SAF/GC.

2.5.2. Provide funding for travel, per diem, and other necessary expenses according to the Joint Federal Travel Regulation (JFTR) for military members and the Joint Travel Regulation (JTR), Volume 2, for civilians.

2.6. Petitions for Stays of a Personnel Action Filed by the OSC . The OSC may request that the MSPB stay a personnel action.

2.6.1. When the OSC serves an activity with a petition for a stay, the base liaison officer notifies the MAJCOM liaison officer and CLLO immediately. See 5 CFR, part 1201, subpart D, for further information. Where the Air Force has voluntarily agreed to a stay of a personnel action or where the MSPB has granted a stay at the request of the OSC, the installation staff judge advocate shall report weekly in writing to SAF/GCA through CLLO, any development concerning the employee(s) affected by the stay (including "no change" reports). This weekly written report shall be sent by facsimile transmission to be received by close of business, each Friday during the period of the stay.

2.7. Training. The Civilian Personnel Office ensures that local training for all civilian personnel specialists, attorneys, and management officials covers OSC functions and activities.

3. Rights of Employees and Military Members:

3.1. Air Force employees and military members must cooperate in an OSC proceeding if either the OSC or the Air Force requests it, subject only to proper exercise of rights pursuant to the Fifth Amendment or Article 31, *Uniform Code of Military Justice (UCMJ)*.

3.2. The employee's participation is considered official business if the employee is otherwise in a duty status. If an OSC representative directly contacts the employee and wishes to meet during duty hours, arrangements must be made with the employee's supervisor.

3.3. If the OSC is investigating an employee, the employee may be entitled to legal representation under the provisions of paragraph 4 of this instruction. Subject to the self-incrimination limitation set forth above, the employee is required to:

- Answer all questions truthfully and completely.
- Request clarification of any questions that the employee does not clearly understand.

3.4. The employee may use a tape recorder as long as:

- The recorder is in full view.
- All attendees know about the recorder.
- The OSC investigator agrees to the tape recording.

3.5. Be sure to correct any errors in a written summary or affidavit before the employee signs the statement.

3.5.1. The employee may initial pen-and-ink changes as appropriate.

3.5.2. The employee does not have to sign any written summary or affidavit that is not complete and accurate.

3.6. The employee may request a copy of the summary or affidavit as a condition of signing. The employee may also request a copy of any tape recording. The employee, however, may have to provide the OSC investigator with a blank tape for this purpose.

3.7. The employee is protected by law from retaliation based on participation in an OSC investigation.

3.7.1. If the employee believes retaliation occurred because he or she participated in an investigation, the employee may promptly contact the Civilian Personnel Office for information on grievance and complaint rights and consult with the SJA before meeting with the OSC investigator.

4. Rights to Legal Representation:

4.1. An employee or military member who is asked to provide testimony or documents to the OSC may obtain legal advice from Air Force attorneys. This advice includes assistance in interviews with OSC investigators. An attorney-client relationship, however, does not exist unless certain conditions are met.

4.2. Employees who believe the OSC suspects them of or is accusing them of committing an improper or illegal act may obtain legal counsel from the Government under the conditions prescribed in DoD Directive 5500.19, when the alleged act was within the scope of the employee's official responsibilities and such representation is in the interest of the Air Force.

4.2.1. The Air Force will not provide representation when it is taking disciplinary action against an employee.

4.2.2. The Air Force may retain outside legal counsel on behalf of the employee only under unusual circumstances and only with the personal approval of the DoD/GC.

4.2.3. The attorney assigned must be a military member or civilian employee from another DoD component when:

- An Air Force attorney is likely to face a conflict of interest between the ethical obligation to the employee-client and the interests of the Air Force as employer.
- An employee has requested, and has been approved, representation from a component other than the Air Force.

4.3. The SAF/GC determines whether an Air Force attorney assigned to represent the employee is likely to have a conflict of interest. Where a conflict appears likely or when the suspected or accused employee has requested representation from another component, the SAF/GC asks another DoD component General Counsel for help in obtaining representation from outside the Air Force.

4.4. To obtain legal representation, the requesting employee must:

- Submit a written request for legal representation to the activity SJA, including all documents served on that employee, explaining the circumstances that justify the requested counsel.
- State in writing whether the employee has retained legal counsel from outside the DoD.
- Obtain a written certification from that employee's supervisor stating that the employee was acting within the scope of official duties and that no adverse or disciplinary action has been initiated against the employee for the conduct that the OSC is investigating.

4.5. Employee requests for legal representation are, if appropriate, approved by the SAF/GC, through Air Force SJA channels.

4.5.1. The activity SJA forwards the request to the Central Labor Law Office, General Litigation Division, (HQ AFLSA/JACL-CLLO) with a copy to the major command (MAJCOM) SJA. The activity SJA writes a brief litigation report detailing:

- Facts pertinent to the matters under investigation and the requesting employee's relationship and involvement in those matters.
- The SJA's recommendation as to whether providing counsel is appropriate and whether an Air Force counsel might face ethical problems.

4.6. HQ AFLSA/JACL evaluates the request and forwards it, with recommendations, to SAF/GC. Send a copy of the recommendations to the MAJCOM and activity SJAs.

4.7. If Air Force representation is to be approved, the accused employee must be given a written explanation of the conditions of legal representation and the employee must acknowledge receipt in writing.

4.7.1. An attorney-client relationship is established and continued between the employee and assigned counsel. Representation may be limited, however, to certain issues if other issues do not satisfy the requirements of this instruction.

4.7.2. In representing an employee of the Air Force or other DoD component, an Air Force attorney acts as a vigorous advocate of the employee's individual legal interests before the OSC or the MSPB. The attorney's professional responsibility to the DoD and Air Force is satisfied by fulfilling this responsibility to the employee. The employee's right to legal representation may be terminated only with the approval of the SAF/GC.

4.7.3. The attorney-client relationship may terminate if the assigned counsel for the employee determines, with the approval of the SAF/GC, that either of these situations apply:

- The employee was acting outside the scope of his or her official duties when engaging in the conduct that the OSC is investigating
- The assigned counsel would not be violating the rules of professional conduct in terminating the professional representation.

4.7.4. An Air Force attorney who is designated counsel may request relief from the duties of representation or counseling without having to furnish an explanation if such an explanation might compromise the attorney-client confidentiality.

4.8. If SAF/GC approves an employee's request for representation by an Air Force attorney, the Chief, General Litigation Division appoints a judge advocate or attorney-advisor after notification and consultation with that attorney's Commander or MAJCOM (or equivalent) Staff Judge Advocate.

4.8.1. If SAF/GC approves an employee's request for representation by an Air Force attorney, the Chief, General Litigation Division appoints a judge advocate or attorney advisor after notification and consultation with that attorney's commander or MAJCOM (or equivalent) Staff Judge Advocate.

4.8.2. If SAF/GC approves an employee's request for representation from outside the Air Force, the Chief, General Litigation Division, on behalf of SAF/GC contacts other Military Departments or Federal agencies to identify an available attorney. Upon identification and appointment by the outside Department or Agency, that attorney is made available to the employee requesting representation. Only SAF/GC may approve hiring of retained outside counsel.

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General Counsel

Attachment 1

GLOSSARY REFERENCES, ABBREVIATIONS, ACRONYMS, TERMS

Section A--References

Title 5 U.S.C. § 7501 et seq

Title 5 U.S.C. § 4301 et seq

Title 5 CFR, part 1201, subpart D

DoD Directive 5500.19, *Cooperation with the Office of the Special Counsel of the Merit Systems Protection Board*, December 6, 1985

DoD Directive 5200.1, *DoD Information Security Program*, June 7, 1982 With Changes 1 and 2

Article 31, *Uniform Code of Military Justice (UCMJ)*

AFPD 36-9, *Air Force Senior Executive Service*

AFPD 51-1, *The Judge Advocate General's Department*

AFI 31-401, *Information Security Program Management* (formerly AFR 205-1)

AFI 36-704, *Discipline and Adverse Action* (formerly AFR 40-750)

Section B--Abbreviations and Acronyms

CFR—Code of Federal Regulation

CLLO—Central Labor Law Office

DP—Deputy Chief of Staff, Personnel

DoD—Department of Defense

GC—General Counsel

JFTR—Joint Federal Travel Regulation

JTR—Joint Travel Regulation

MAJCOM—Major Command

MSPB—Merit System Protection Board

OSC—Office of the Special Counsel

SAF—Secretary of the Air Force

SJA—Staff Judge Advocate

UCMJ—Uniform Code of Military Justice

U.S.C.—United States Code

Section C--Terms

Improper or Illegal Conduct—(1) A violation of any law, rule, or regulation in connection with Government misconduct. (2) Gross mismanagement, a gross waste of funds, abuse of authority, or a

substantial and specific danger to public health or safety.

Personnel Action:—

- An appointment.
- A promotion.
- An adverse action under 5 U.S.C. § 7501 et seq. or other disciplinary or correction action.
- A detail, transfer, or reassignment.
- A reinstatement.
- A restoration.
- A reemployment.
- A performance evaluation under 5 U.S.C. § 4301 et seq.
- A decision concerning pay, benefits, or awards, or concerning education or training if the education or training may lead to an appointment, promotion, performance evaluation, or other personnel action.
- Any other significant change in duties or responsibilities that is inconsistent with the employee's salary or grade level.

Prohibited Personnel Practice—Action taken by an employee who has authority to take, direct others to take, recommend, or approve any personnel action:

- That discriminates for or against any employee or applicant for employment on the basis of race, color, religion, sex, national origin, age, disability, marital status, or political affiliation, as prohibited by certain specified laws.
- To solicit or consider any recommendation or statement, oral or written, about any individual who requests or is under reconsideration for any personnel action, unless the recommendation or statement is based on the personal knowledge or records of the person furnishing it and consists of an evaluation of the work performance, ability, aptitude, or general qualifications of the individual or an evaluation of the character, loyalty, or suitability of such individual.
- To coerce the political activity of any person (including providing a political contribution or service) or to act against any employee or applicant for employment as a reprisal as a reprisal for the refusal of any person refused to engage in such political activity.
- To deceive or willfully obstruct any person regarding such person's right to compete for employment.
- To influence any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment.
- To grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment.
- To appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement in or to a civilian position any individual who is a relative (as defined in 5 U.S.C. § 3110) of the employee if the position is in the agency in which the employee is serving as a public official or over which the employee exercises jurisdiction or control as an official.

- To take or fail to take a personnel action with respect to any employee or applicant for employment as a reprisal for being a whistleblower).
- To take or fail to take, or threaten to take or fail to take, a personnel action against an employee or applicant for employment as a reprisal for exercising an appeal right granted by law, rule, or regulation.
- To discriminate for or against any employee or applicant for employment on the basis of conduct that does not adversely affect the performance of the employee or applicant or the performance of others.
- To take or fail to take any other personnel action if the taking of or failure to take, such an action violates any law, rule, or regulation implementing or directly concerning the merit system principles contained in 5 U.S.C. § 2301.

Whistleblower—A present or former Federal employee or applicant for Federal employment who discloses information that he or she reasonably believes evidences:

- A violation of any law, rule, or regulation;
- Gross mismanagement, a gross waste of funds, or an abuse of authority;
- A substantial or specific danger to public health or safety.
- Such disclosure qualifies as whistleblowing if it is not specifically prohibited by statute and if information is not specifically required by Executive Order to be kept secret in the interest of national defense or the conduct of foreign affairs.
- Where the information disclosed affects only the personal situation of the complainant, it is generally to be regarded an allegation of a prohibited personnel practice or a violation of a civil service law, rule, or regulation. The complainant is not considered a whistleblower.